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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MANUEL LOMA-TORRES, Defendant.	)	Criminal Case No. 08CR0538-IEG DATE: August 8, 2008 TIME: 2 p.m. Honorable Irma E. Gonzalez Courtroom 1 GOVERNMENT'S SUPPLEMENTAL RESPONSE AND OPPOSITION TO DEFENDANTS MOTION TO DISMISS THE INDICTMENT ON THE BASIS OF THE PRESENTMENT CLAUSE TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Steven De Salvo, Assistant U.S. Attorney, and hereby files, at the request of the Court, its Supplemental Response and Opposition to the Defendant's Motion to Dismiss the Indictment. Said motions are based upon the files and records of this case together with the attached statement of facts and memorandum of points and authorities.

STATEMENT OF THE CASE

Defendant Manuel Loma-Torres ("Defendant") was indicted by a grand jury on February 27, 2008, and charged with being a deported alien found in the United States in violation of 8 U.S.C. § 1326. The Indictment includes a special allegation that Defendant was deported, removed, and excluded after June 6, 2006.

II

STATEMENT OF FACTS[1/]

On January 27, 2008, Senior Patrol Agent Luis E. Burruel was informed by local police that Defendant and another alien had been found walking in an agricultural area about four miles northwest of Brawley, California. When Agent Burruel arrived, he asked Defendant where he was a citizen or national, and Defendant replied that he was from Mexico and admitted that he had crossed into the United States without permission. Defendant was then taken into custody and advised of their administrative rights. Later, while being transported to the station, Agent Burruel asked Defendant if he had been previously deported, and Defendant replied "yes." The agent asked whether he had served time in jail, and Defendant admitted that he had done time in jail for illegal drugs. At the station, Defendant was advised of his Miranda rights and agreed to answer questions without a lawyer. During his post-Miranda statement, which was videotaped, Defendant admitted that he was a citizen of Mexico, and that had illegally crossed into the United States by crossing through the mountains, and that he had been previously deported.

III

POINTS AND AUTHORITIES

A. THE MOTION TO DISMISS THE INDICTMENT SHOULD BE DENIED BECAUSE THERE WAS NO VIOLATION OF THE FIFTH AMENDMENT PRESENTMENT CLAUSE

Defendant argues that the Indictment is defective because it does not allege a deportation date

[1/] These facts are taken from the Record of Deportable/Inadmissible Alien (I-213 Form), and the Continuation Page for that form, which are attached hereto as Exhibit A.

or a temporal relationship to his removal. See Def's Memorandum of Points and Authorities in Support of Motion to Dismiss ("Def's Memorandum"), at 2. Defendant acknowledges, however, that the Indictment specifically alleges that Defendant was removed from the United States subsequent to June 6, 2006. [Id. at 2.] This date is subsequent to Defendant's aggravated felony conviction and prior to his "found in" date of January 27, 2008, as charged in the Indictment. Defendant, relying on United States v. Salazar-Lopez, 506 F.3d 748, 751-52 (9th Cir. 2007), argues that the indictment's allegation that defendant was removed "subsequent to" the date of the prior conviction is not sufficient.. However, Salazar-Lopez actually *supports* the indictment against this Defendant. Specifically, the Ninth Circuit stated that "the date of the removal, or at least the fact that [Defendant] had been removed *after* his conviction, should have been alleged in the indictment and proved to the jury." Salazar-Lopez,506 F.3d at 752 (emphasis added). Here, the indictment expressly states that Defendant was removed subsequent to June 6, 2006, his date of conviction. Thus, under Salazar-Lopez, the indictment need not specifically allege the date of removal.

Defendant nevertheless retools his argument by alleging that the lack of specificity violates the Fifth Amendment's Presentment Clause. He alleges that the lack of specificity violates the Presentment Clause in two ways: (1) that there is no indication that the grand jury "was charged with the legal meaning of the word 'removal'. . .as opposed to being simply removed from the United States in the colloquial sense, and (2) that the Government may at trial rely on a deportation that was never presented to, or considered by, the grand jury. Def's Memorandum at 4-5. Defendant's claims lack merit.

The Court should deny Defendant's motion to dismiss the indictment based on his speculation regarding the adequacy of the instructions to the grand jury regarding legal terms such as "removal" or "deportation." The U.S. Supreme Court has held that the Fifth Amendment right not to be tried for a crime not presented to a grand jury is triggered by "only a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment." Midland Asphalt Corp. v. United States, 489 U.S. 794, 802 (1989). If a grand jury should ever return a true bill when there is insufficient evidence, the greatest safeguard is the petit jury and the rules governing its determination of guilty. See Sears, Roebuck & Co., 719 F.2d 1386, 1392 (9th Cir. 1983).

Moreover, the Constitution does not require the government to provide to the grand jury legal instructions regarding terms in an indictment. In United States v. Kenny, 645 F.2d 1323 (9th Cir. 1981), cert. denied, 452 U.S. 920 (1981), the Court rejected the defendant's request to dismiss the indictment on the basis of his allegation that the grand jury returned a true bill without any instruction on the applicable law. The Court stated that it was "not persuaded that the Constitution imposes the additional requirement that grand jurors receive legal instructions" and warned that "the giving of such instructions portends protracted review of their adequacy and correctness." Id. at 1347.

In this case, Defendant seeks to accomplish precisely what Kenny feared. Namely, he wishes for this Court to review the adequacy and correctness of any instruction to the grand jury. The Court cannot do so. This is particularly true considering that even if there was evidence—rather than merely Defendant's speculation—that the grand jury was not instructed on an element of the offense, this would not be sufficient grounds to compel the dismissal of the indictment. See Wright, 667 F.2d at 796 (holding that erroneous grand jury instructions do not automatically invalidate an otherwise proper indictment); United States v. Larrazolo, 869 F.2d 1354, 1359 (9th Cir.1989), overruled on other grounds by Midland Asphalt, 489 U.S. at 799-800 (concluding that even if the grand jury instructions were erroneous, the defendant failed to show that he was prejudiced).

In the same vein, there is no basis for Defendant to argue that the Government might try to offer evidence of a removal that differs from the one presented to the grand jury, much less that this would be improper. Any argument that the Indictment should be dismissed on this basis is wholly undermined by the fact that the United States often presents evidence in § 1326 prosecutions of multiple deportations. See United States v. Martinez-Rodriguez, 472 F.3d 1087, 1092 (9th Cir. Jan 3, 2007), as amended (stating that "the government was entitled to introduce evidence of both deportations to hedge the risk that the jury may reject the offered proof of one deportation, but not the other"). This longstanding practice belies Defendant's claim that the Government is limited to proving one deportation and that this single particular deportation must be presented to the grand jury.

More importantly, the remedy for Defendant's alleged problem is not to dismiss the indictment. An accused's *only* cognizable interest in grand jury proceedings—and thus the *only* interest that courts can vindicate by dismissing an indictment on constitutional grounds—is the right to have a legally constituted grand jury make an informed and independent evaluation of the evidence to determine if there is probable cause to believe him guilty of a crime. United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1392 n.7 (9th Cir. 1983) (citing United States v. Wright, 667 F.2d 793, 796 (9th Cir. 1982)). The defendant must show that the prosecutor's conduct was "so flagrant" that it deceived the grand jury in a significant way, thereby infringing on its ability to exercise independent judgment. See Wright, 667 F.2d at 796. Defendant has not and cannot allege prosecutorial misconduct. Furthermore, from the face of the Indictment, the grand jury found probable cause to believe that Defendant was removed from the United States subsequent to August 29, 2002. Such a finding is sufficient to satisfy the requirements of United States v. Covian-Sandoval, 462 F.3d 1070 (9th Cir. 2006), and must necessarily suffice to satisfy the Presentment Clause.

As previously stated, Defendant does not and cannot credibly allege that the Government attempted to mislead the grand jury. Furthermore, there is no basis to suppose that the grand jury was impaired in its ability to independently evaluate the evidence. Because Defendant has nothing but pure speculation to support his motion to dismiss, it should be denied.

IV

CONCLUSION

The Government respectfully requests that the Court deny Defendant's motions for the reasons stated above.

DATED: July 21, 2008

Respectfully submitted,
KAREN P. HEWITT
United States Attorney

STEVEN DE SALVO
Assistant U.S. Attorney

UNTIED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MANUEL LOMA-TORRES, Defendant.	Criminal Case No. 08CR0538-IEG CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that:

I, Steven De Salvo, am a citizen of the United States over the age of 18 years and a resident of San Diego County, California; my business address is 880 Front Street, Room 6293 San Diego, California 92101-8800; I am not a party to the above-entitled action, I filed **UNITED STATES' SUPPLEMENTAL RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** by filing it through the ECF system and causing notification to defense counsel by email to the following:

Jennifer Coon, Federal Defenders

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 21, 2008

/s/ Steven De Salvo
Steven De Salvo